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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARCOS MANSON ADAMS, Defendant and Appellant.	C085290 (Super. Ct. No. 15F05630)

Defendant Marcos Manson Adams shot Latesha Doe during an argument in the street after she struck him in the face. The jury found defendant not guilty of attempted murder but convicted him of attempted voluntary manslaughter (Pen. Code, §§ 664/192, subd. (a)),[1] domestic violence (§§ 273.5, subd. (a), 12022.7, subd. (e)), assault with a firearm (§ 245, subd. (a)(2), 12022.5, subd. (a)), and being a felon in possession of a firearm (§ 29800, subd. (a)(1)). With enhancements for a prior serious felony conviction

[1] Unless otherwise designated, all statutory references are to the Penal Code.

and two terms in prison (§§ 667, subd. (a), 667.5, subd. (b)) found true by the court, defendant was sentenced to a term of 30 years, four months.

Latesha declined to testify at trial.[2] Defendant contends that admission of Latesha's statement to a police officer at the scene, "My boyfriend Marcos shot me," violated the confrontation clause and did not qualify for the spontaneous statement exception to the prohibition on hearsay evidence. We disagree with both arguments and find no error.

Defendant also objects to (1) admission of Latesha's out-of-court statement to a friend that "He" shot me, (2) the prosecutor's question to the friend about that statement which assumed facts not in evidence, (3) a witness's identification of defendant at trial using an altered photographic lineup, and (4) joinder of a charge involving another woman that was dismissed during trial. We find no error, but assuming error, defendant was not prejudiced.

However, as defendant contends and the Attorney General concedes, the trial court erred in failing to give the pattern instruction, CALCRIM No. 332, on expert testimony after the prosecution presented an expert on domestic violence. That error was harmless given the other instructions delivered to the jury.

The judgment is affirmed.

FACTUAL BACKGROUND

On the night of August 30, 2015, Dora Lopez was driving down Stockton Boulevard in Sacramento with her boyfriend, David Rodriguez, when a car backed out of an apartment complex and stopped in the middle of the street. Ms. Lopez brought her vehicle to a stop. A man and a woman came out into the street arguing. Ms. Lopez

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[2] As the trial court did, we refer to the victim by her first name with no disrespect intended.

testified they were about 10 feet away; Mr. Rodriguez put the distance at 20 feet. The man yelled at a person in the car, which drove off. Ms. Lopez did not move because the man and woman were in the street. The man called the woman a name and she hit him in the face several times. The man drew a gun tucked into his belt, pointed it at the woman's head, and fired. The woman was facing the man, holding her hands in front of her like a shield. It appeared to Ms. Lopez and Mr. Rodriguez that the man shot the woman in the face. The woman screamed and fell to the ground. The man ran back into the apartment complex.

Ms. Lopez drove off and called 911—at 9:51 p.m. according to the transcript of the call—and reported that a man had shot a woman on Stockton Boulevard. She told the 911 operator that the man and woman were "a black couple," the man was a "[b]lack guy with dreads," he was in his late 20's or early 30's, he was five feet eight inches or five feet nine inches tall, and he was stocky. The operator asked, "Which way did he go?" Ms. Lopez said, "I think he . . . ran back into the apartments."

Mr. Rodriguez testified at trial that the man's dreadlocks were a little past his shoulders. Mr. Rodriguez said that man was in his mid-30's or late 20's and five feet ten inches or maybe six feet tall. During the incident, the man and woman were facing each other, sideways to Mr. Rodriguez. Mr. Rodriguez testified that the man had multiple tattoos covering his arm, but it was too dark to make them out. The entire incident, from when the car pulled out in front of Ms. Lopez and Mr. Rodriguez and when they drove away, lasted about a minute.

Latesha telephoned her roommate, Keela Cole, and asked her to come to the apartment complex on Stockton Avenue. Latesha was yelling on the phone and, when Ms. Cole arrived at the apartment complex five or 10 minutes later, Latesha was in front crying. Ms. Cole testified that Latesha said she had been shot and "He" shot her. Latesha did not give a name. A few minutes later, an ambulance arrived.

Ms. Cole had seen defendant before together with Latesha "[a]s a couple," because defendant "was her boyfriend." On cross-examination, Ms. Cole testified that Latesha had several boyfriends in August 2015. Defendant and Latesha were "on their way" to not seeing each other anymore. They were more together in July 2015.

Sheriff's Deputy Anthony Archuletta was dispatched to the apartment complex on a report that a man had shot a woman. He arrived at about 10:00 p.m. Deputy Archuletta contacted Latesha, who was on a gurney in an ambulance. Latesha "was screaming in pain, just really distraught. Hysterical." She was not able to answer a question coherently. Deputy Archuletta was trying to determine what was happening at that point. He was not taking a formal statement; he was trying to figure out if a crime had occurred. Initially, the deputy was only able to get her name. When Latesha calmed down a bit, he asked her what happened and she said, "My boyfriend Marcos shot me."

Deputy Archuletta testified he had seen defendant before. In July 2015 defendant was in a car and had to release the car to someone. He released the car to Latesha. They shared a hug and a kiss as defendant was leaving.

The paramedic in the ambulance did not believe that Latesha had been shot. The wound did not look like a gunshot wound to Deputy Archuletta. Latesha was taken to the hospital to verify that she had not been shot. At the hospital, a doctor informed Deputy Archuletta that Latesha had been shot, as confirmed by a CT scan showing a small caliber bullet in her elbow.

On September 15, 2015, a detective interviewed Ms. Lopez and Mr. Rodriguez. The detective had prepared a photographic lineup of six photographs showing defendant plus five individuals with similar physical features. The photograph in the lower left-hand corner in the number four position was of defendant.

The detective showed the lineup separately to Ms. Lopez and Mr. Rodriguez. Ms. Lopez initialed the photograph in the number four position as the person who fired the firearm. She stated, "If anything it might have been him. But I'm not sure. 'Cause his

hair wasn't short like that or anything."[3] Ms. Lopez indicated that she did not think the rest of the photos were the shooter.

Mr. Rodriguez initialed the photographs in the two and four positions.[4] He was not 100 percent positive that these photos were of the shooter. He testified he could not rule out those two, while he was sure the others were not the shooter.

At trial, Ms. Lopez confirmed that she had initialed the photographic lineup identifying the person she believed was responsible for the shooting. She also confirmed that the person she described in the 911 call had long dreadlocks to his shoulders. She testified, however, she did not see the person who fired the shot sitting in the courtroom. The court directed Ms. Lopez to look at defendant, who was wearing a white dress shirt and tie and seated at the counsel table. Ms. Lopez stated she did not think that was the person. When the court asked what features about that person made her think he was not the shooter, Ms. Lopez stated, "Well, I mean it was three years ago. I just remember he had dreads and he was a little more stocky." Mr. Lopez testified that she picked the photograph in the lineup, because "[h]e looked more husky because from what I remember he was like a kind of a husky dude and he had dreads that were just like to the shoulder."

Mr. Rodriguez also stated at trial that he did not see the person who fired the shot in the courtroom. He confirmed that he had identified the person responsible for the shooting in the photographic lineup. He initialed the lineup in two places because the shooter was one of those two people and none of the others. The court asked Mr. Rodriguez if one of the photos he saw in the lineup was of "the gentleman in the white

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[3] The photograph in position four of the photographic lineup showed an individual with dreadlocks to the shoulder. Photos in some of the other positions showed individuals with shorter dreadlocks.

[4] These individuals had dreadlocks to their shoulders.

shirt and tie in court here today." Mr. Rodriguez stated, "[A]ll of them had dreadlocks as far as I remember that's the main description I remember. So I do not see dreadlocks on him unless you show me the photo again maybe I can see him without the dreadlocks maybe I'd be different." Mr. Rodriguez stated he would not be able to recognize the shooter if he saw him again, because dreadlocks were the main feature of the photographic lineup.

The prosecutor placed his fingers over the dreadlocks in the photograph in the four position to assist Mr. Rodriguez's recollection, and he testified that defendant at the counsel table "pretty much looked like him without the dreads." Between the two photographs Mr. Rodriguez initialed, he testified the one on the bottom left was more likely the person responsible for the shooting.

At trial, the detective who prepared the lineup also could not identify defendant in the courtroom as the person in position four, "because his appearance has changed such [*sic*] drastically."

The detective testified that he had difficulty contacting Latesha. When he met her, he observed a healed wound on her left arm next to the elbow. The detective showed her the photographic lineup. She appeared apprehensive and reluctant and abruptly left the interview.

Latesha appeared at trial. In proceedings outside the presence of the jury, Latesha stated to the court that she was reluctant to testify, understood that she had no right to refuse to testify, would not explain how she came to be shot even if the court held her in contempt and put her in jail for refusing to testify, stated she could not remember what happened, and confirmed that she was refusing to testify. Latesha was in custody on an unrelated matter when she appeared at trial and was represented by counsel. With the agreement of the prosecutor and defense counsel, the court so informed the jury when Latesha was on the witness stand, while admonishing jurors not to speculate why she was in custody.

With the jury present, the prosecutor asked Latesha three questions: (1) did she know the defendant, (2) was she shot on August 30, 2015, and (3) was there any question that he could ask that she would answer. Latesha did not respond. At the trial judge's request, Latesha raised her left arm showing a mark above the elbow.

The prosecution called David Cropp, who testified to his background working with families and children exposed to domestic violence, including formerly as a Sacramento police officer. Mr. Cropp testified he had qualified 18 times as an expert in the area of domestic violence and victim and witness participation. Mr. Cropp testified that it was very common in the criminal justice system for victims of domestic violence to refuse to cooperate with the prosecution or to change or recant their previous statements. The reasons for this behavior included reluctance to be adverse to a person who may be a co-parent or "somebody they may love." A victim also may fear retaliation, stalking, threats, being alone, being unable to support the children, and family or social judgments. Mr. Cropp had seen in the literature estimates that up to 80 percent of domestic abuse victims refuse to cooperate with law enforcement. Mr. Cropp confirmed that he knew nothing about this case, had not read any police reports on it, and did not know the defendant.

DISCUSSION

Latesha's Out-of-court Identification of Defendant to Police

Confrontation Clause

Defendant contends that admitting Latesha's statement to Deputy Archuletta—"My boyfriend Marcos shot me"—violated his right to confront witnesses under the Sixth and Fourteenth Amendments, because the statement was "testimonial."

We review this contention de novo. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466 (*Nelson*).)

The applicable law begins with *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), in which the United States Supreme Court held that out-of-court "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59.) Latesha did not testify at trial and defendant had no opportunity to cross-examine her.[5] Accordingly, her statement to Deputy Archuletta is admissible only if it was nontestimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 821 [165 L.Ed.2d 224] (*Davis*).)

In *Davis*, the Supreme Court explained that a statement is nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Davis, supra*, 547 U.S. at p. 822.) A statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to criminal prosecution. [Fn. omitted.]" (*Ibid.*) In the first of two companion cases in *Davis*, (case No. 05-5224) statements made by a domestic violence victim to a

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[5] We reject the Attorney General's assertion that Latesha was available for cross-examination because she appeared at court, even though she refused to answer any of the prosecutor's questions. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 413 ["the *Crawford* rule does not apply when the declarant testifies and is thus subject to cross-examination"].) As the Attorney General concedes, a witness who refuses to answer any questions denies a defendant a meaningful opportunity for cross-examination. (*Douglas v. Alabama* (1965) 380 U.S. 415, 419-420 [13 L.Ed.2d 934]; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 965-966; *People v. Perez* (2016) 243 Cal.App.4th 863, 886; *People v. Murillo* (2014) 231 Cal.App.4th 448, 456; *People v. Rios* (1985) 163 Cal.App.3d 852, 864-865.) The Attorney General suggests that a defendant must question a recalcitrant witness who has refused to answer the prosecutor's questions or forfeit a confrontation clause challenge on appeal. However, proceedings conducted outside the presence of the jury confirmed that Latesha would refuse to answer any questions put by the prosecutor or defense counsel. As noted, Latesha did not respond to the prosecutor's catch-all question whether there was any question she would answer.

911 operator identifying the defendant Davis as her assailant, and describing what he was doing during the call, were determined to be nontestimonial. (*Id.* at pp. 817-818, 828-829.)

In the companion domestic violence case, *Hammon v. Indiana* (case No. 05-5705) (*Hammon*) the Supreme Court found that there was no ongoing emergency where the victim appeared calm when encountered by police on the front porch of her home, but when questioned outside the defendant Hammon's presence said that he had thrown her down on broken glass and punched her in the chest. The court held these statements were made for the purpose of investigating a past crime, rather than to assist police in intervening in an emergency, and thus were barred by the confrontation clause. (*Davis, supra*, 547 U.S. at pp. 819-821, 829-830.)

In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), the California Supreme Court applied *Crawford*, *Davis*, and *Hammon* in a case where the defendant was convicted of aggravated assault for slashing her son's face with a glass shard. (*Id.* at pp. 970, 972; *People v. Kerley* (2018) 23 Cal.App.5th 513, 548-549 (*Kerley*).) At the hospital, a police officer interviewed the victim in the emergency department and asked what had happened. (*Cage, supra*, at pp. 971-972.) The victim said that, during an argument, his mother pushed him and he fell on a glass-topped coffee table, breaking it. (*Id.* at p. 972.) His grandmother held him down and his mother slashed his face with a piece of the broken glass. (*Ibid.*) After he was released from the hospital, the victim gave a more detailed statement in a tape-recorded interview at the police station. (*Id.* at pp. 972-973.) The victim did not testify at trial. (*Id.* at p. 973.) The Supreme Court held that both statements to police were testimonial. (*Id.* at pp. 984-985.) "The incident leading to the injury had been over for more than an hour. The assailant was far away. The victim was in no danger of further assault by his mother." (*Kerley, supra*, 23 Cal.App.5th at pp. 548-549; *Cage, supra*, 40 Cal.4th at p. 985; compare *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1597-1598 (*Saracoglu*) [the purpose of statements by the victim,

who fled to police station, that her husband had assaulted and threatened to kill her if she went to police, were to gain police protection in an ongoing emergency].) The victim's statements to the surgeon in the emergency department about how the injury occurred were nontestimonial, because the surgeon's question was for the purpose of diagnosis and treatment, not to gather evidence for use at trial. (*Kerley, supra*, 23 Cal.App.5th at p. 549; *Cage, supra*, 40 Cal.4th at p. 986.)

Cage is inapposite here because the testimonial statements to police in that case were made after the victim was taken to the hospital. (*People v. Brenn* (2007) 152 Cal.App.4th 166, 176 (*Brenn*).) *Cage* is nonetheless instructive because the Supreme Court emphasized that "the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial." (*Cage, supra*, 40 Cal.4th at p. 984, fn. 14,; *Brenn, supra*, 152 Cal.App.4th at p. 177.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 [179 L.Ed.2d 93] (*Bryant*), police officers questioned a man found in a gas station parking lot bleeding from a gunshot wound. (*Id.* at p. 349.) The court held that the man's statements were not testimonial because an ongoing emergency had not been resolved, the scene was not secured, the shooter was at large, and the victim was in great distress (the wound ultimately proved fatal), which suggested his answers were not given for testimonial purposes. (*Id.* at p. 375.) The court noted that the questions were asked in a public area before emergency medical personnel arrived and were the type of questions (i.e., what happened?) that police need to ask to assess the threat to their own safety and danger to the victim and the public. (*Id.* at pp. 375-376.)

The distinguishing principle in *Davis*, *Hammon*, and *Bryant* is the primary purpose of the out-of-court statements. (*People v. Sanchez* (2016) 63 Cal.4th 665, 689.) "Testimonial statements are those made primarily to memorialize facts relating to past

criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Ibid.*)

The court in *Davis* noted that the exigencies of assessing a domestic violence incident "may *often* mean that 'initial inquiries' produce nontestimonial statements." (*Davis, supra*, 547 U.S. at p. 832; *Bryant, supra*, 562 U.S. at p. 377; see also *Brenn, supra,* 152 Cal.App.4th at p. 178 [" 'Preliminary questions asked at the scene of a crime do not rise to the level of an "interrogation." Such unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police "interrogation" as that term is used in *Crawford.* [Citations.]' "]; *People v. Corella* (2004) 122 Cal.App.4th 461, 469.)

Based on *Bryant,* the California Supreme Court in *People v. Blacksher* (2011) 52 Cal.4th 769, 813-815, articulated six factors to consider in determining whether a hearsay statement is testimonial or nontestimonial, which the court in *People v. Chism* (2014) 58 Cal.4th 1266 (*Chism*), summarized as follows: "(1) an objective evaluation of the circumstances of the encounter and the statements and actions of the individuals involved in the encounter; (2) whether the statements were made during an ongoing emergency or under circumstances that reasonably appeared to present an emergency, or were obtained for purposes other than for use by the prosecution at trial; (3) whether any actual or perceived emergency presented an ongoing threat to first responders or the public; (4) the declarant's medical condition; (5) whether the focus of the interrogation had shifted from addressing an ongoing emergency to obtaining evidence for trial; and (6) the informality of the statement and the circumstances under which it was obtained." (*Id.* at p. 1289.)

Applying these principles in *Chism,* the Supreme Court determined that the statements of a witness to a police officer describing a shooting at a liquor store were nontestimonial. (*Chism, supra*, 58 Cal.4th at p. 1289.) The officer was the first on the

scene, the encounter took place outside the liquor store where the shooting had recently occurred, the witness appeared very nervous and shaken up, and the officer reasonably believed that an armed suspect was at large and posed a threat to police officers and the public. (*Ibid.*)

In this instance, the trial court held an Evidence Code section 402 hearing to determine the admissibility of Latesha's statement. Deputy Archuletta testified consistent with his trial testimony but with some additional details. We review this testimony, as well, to apply the factors enumerated in *Chism.*

On arriving at the scene, Deputy Archuletta was doing a quick canvas of the area and potential witnesses until another deputy informed him over the radio that the victim had been located in an ambulance. Two other deputies who arrived at about the same time as Deputy Archuletta had already spoken to Latesha. The information Deputy Archuletta had up to that point was that some people driving by had witnessed "a female on the ground and a male possibly shooter." Deputy Archuletta did not know who the suspect or the victim was.

When Deputy Archuletta spoke to Latesha, she was in so much pain and screaming so loudly that she could not focus on his questions. She was screaming "it hurts, it hurts, it hurts." Deputy Archuletta was confused because the paramedic said Latesha had not been shot. The deputy saw a small hole in Latesha's elbow almost like she fell on a pebble. She wasn't actively bleeding.[6]

Deputy Archuletta "asked her what happened. And that's when she had made the statement her boyfriend Marcos shot her." Deputy Archuletta testified, "At that time we didn't -- we had no idea what had happened. If she had been shot, if she'd not been shot. I was under the impression she had not since fire personnel was there and I already

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[6] When another deputy found shell casings, Deputy Archuletta decided to go to the hospital for a follow-up.

assessed her and [the paramedic] said no she hadn't been shot. So at this point we're kind of confused about what actually occurred or what's going on."

Asked by the court to reconstruct the conversation, Deputy Archuletta testified: "So initially I was trying to get a base of information. You know name, date of birth, address, telephone number. So just from the initial contact just getting her name was difficult. I said, you know, what's your name. And she would, you know, try to tell me her first name but it was very, you know -- she was crying and sobbing so hard it was hard to understand what she was saying. [¶] And then as I continued to question her just about the basic information I was able to get, you know, her -- just her basic quick information. And then I said, can you tell me what happened. And you could tell she was becoming frustrated with the pain and sobbing and she just yelled out, 'My boyfriend, Marcos, shot me.' And that was all she really verbalized at that point."

Deputy Archuletta did not ask Latesha for details of the incident because the ambulance was about to leave to take her to the hospital. He testified that the whole interaction in the ambulance took "maybe two minutes."

The court ruled that "the officer at the time he asked that question was . . . attempt[ing] to resolve in his mind whether he was there investigating a crime or an accident or something else [because he] had been told by the paramedic that [he] didn't think she was even a gunshot victim. [¶] So asking the question what happened is not calculated to produce testimonial evidence and based on the evidence in front of me the response was non-testimonial."

Applying the factors summarized in *Chism*, we conclude that Latesha's statement to Deputy Archuletta was not testimonial and its admission did not violate defendant's Sixth Amendment rights.

First, viewed objectively, Deputy Archuletta was attempting to ascertain at the scene what had occurred after receiving a report that a man had shot a woman, including whether a crime had actually occurred, given that the paramedic in the ambulance did not

think that Latesha had been shot. Latesha was hysterical, crying and complaining of great pain, indicating that she had been shot, but also making it difficult for the deputy to obtain basic information. When Deputy Archuletta asked, what happened, the primary purpose of the question was to find out exactly that, in a confusing situation. The purpose of Latesha's answer was to tell him the cause of the pain she was plainly experiencing. Neither Deputy Archuletta nor Latesha sought to establish past events for use at trial.

Second, as noted, the statement was obtained for a purpose other than for the prosecution to use at trial, i.e., to find out what happened and whether a crime had occurred. But there was also an ongoing emergency: an unidentified person was armed with a gun and his location was unknown. In *Bryant*, the Supreme Court reasoned that "what happened?" is the exact question that police officers would pose to a victim at the scene to assess the situation, the threat to their safety, and possible danger to the victim and the public. (*Bryant, supra*, 562 U.S. at p. 375.) Such information is solicited to enable police to meet an ongoing emergency. (*Id.* at p. 376.)

Third, there was an ongoing threat to first responders and the public. Ms. Lopez told the 911 operator that defendant had run back into the apartment complex after shooting a woman in the street. Although Latesha was no longer in any apparent danger, the situation remained fluid as emergency personnel arrived on scene and there was still a possibility that the shooter still posed a threat. (*Nelson, supra*, 190 Cal.App.4th at p. 1467.)

Fourth, notwithstanding the skepticism of a paramedic in the ambulance, Latesha had been shot minutes before and was in such severe pain and distress that Deputy Archuletta had trouble obtaining and understanding her answers to basic questions.

Fifth, in a two-minute interaction, there was no time for Deputy Archuletta to shift from addressing the immediate situation to obtaining evidence for trial.

Sixth, not only did Deputy Archuletta testify that the circumstances were informal, Latesha was in an ambulance complaining of severe pain from a gunshot wound. A reasonable person would not construe her statement "as a solemn declaration that could lead to criminal charges if it was deliberately fabricated." (*Nelson, supra*, 190 Cal.App.4th at p. 1467.)

The circumstances here consisted of a two-minute exchange between a sheriff's deputy and a possible gunshot victim in great pain and distress in the back of an ambulance about a possible shooting by an as-yet unidentified shooter who had fled the scene minutes before. The deputy's question was directed at no more than finding out what had occurred, which led to information on the basic question of identity. There was no violation of the confrontation clause in admitting Latesha's statement that it was defendant who shot her.

Spontaneous Statement

At the same Evidence Code section 402 hearing, the trial court ruled that Latesha's identification of defendant as the one who shot her fell under Evidence Code section 1240, the exception to the hearsay rule for a spontaneous statement. The trial court ruled, "I do feel that the statement is admissible as a spontaneous declaration according to the Evidence Code. The passage of time is very, very short. It's undisputed that the victim was under great stress. She was in apparent great pain, crying and screaming. [¶] The officer had great difficulty in getting an answer to one question. The one question that he asked, what happened? And the answer the prosecution seeks to admit is my boyfriend shot me."

Defendant argues that Latesha's statement to Deputy Archuletta that defendant shot her did not qualify as a spontaneous exception, because there was time for her nervous excitement to subside and reflective powers return, such that she could fabricate what had occurred. (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 72-73 (*Stanphill*).)

We conclude that the trial court did not err in admitting Latesha's statement under Evidence Code section 1240.

This court addressed the general principles applicable to the exception in *Stanphill*: " 'To qualify for admission under the spontaneous statement exception to the hearsay rule, "an utterance must first purport to describe or explain an act or condition perceived by the declarant. ([Evid. Code,] § 1240, subd. (a).) Secondly, the statement must be made spontaneously, while the declarant is under the stress of excitement caused by the perception. (*Id.*, subd. (b).)" [Citation.] For purposes of the exception, a statement may qualify as spontaneous if it is undertaken without deliberation or reflection. [Citation.] Although . . . responses to detailed questioning are likely to lack spontaneity, . . . an answer to a simple inquiry may be spontaneous. [Citation.]' " (*Stanphill, supra,* 170 Cal.App.4th at p. 73; *People v. Morrison* (2004) 34 Cal.4th 698, 718 (*Morrison*).)

" 'The decision to admit evidence under [Evidence Code] section 1240 is reviewed for abuse of discretion. [Citation.] "Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] . . . In performing this task, the court 'necessarily [exercises] some element of discretion . . . .' " ' " (*Stanphill, supra,* 170 Cal.App.4th at p. 73; *Saracoglu, supra,* 152 Cal.App.4th at pp. 1588-1589.) "We will uphold the trial court's determination if its resolution of factual questions is supported by substantial evidence." (*Stanphill, supra,* 170 Cal.App.4th at p. 73; *People v. Phillips* (2000) 22 Cal.4th 226, 236.) "We review for abuse of discretion the ultimate decision whether to admit the evidence." (*Phillips*, at p. 236.)

In *Stanphill,* we noted that the California Supreme Court in *Morrison* said: " '[S]tatements purporting to name or otherwise identify the perpetrator of a crime may be admissible [under Evidence Code section 1240] where the declarant was the victim of a crime and made the identifying remarks while under the stress of excitement caused by

experiencing the crime.' " (*Stanphill, supra,* 170 Cal.App.4th at pp. 73-74; *Morrison, supra,* 34 Cal.4th at p. 719.)

Defendant contends that Latesha had time to reflect and deliberate, because she had called her friend (Ms. Cole) first instead of 911, and Deputy Archuletta testified that he got her "basic information" before he asked her what happened and she named defendant as the shooter.

Our review of the record establishes her statement was spontaneous. Latesha had been shot minutes before Deputy Archuletta asked her what happened. (*Morrison, supra*, 34 Cal.4th at p. 719 [victim's statement naming the perpetrator made shortly after she was shot qualified as a spontaneous statement]; *People v. Thomas* (2011) 51 Cal.4th 449, 496 [victim's statement to police identifying defendant as perpetrator made minutes after he was attacked and was still bleeding properly admitted as spontaneous statement]; *People v. Pedroza* (2007) 147 Cal.App.4th 784, 791-792 [victim's statements to police given minutes after she was burned qualified as spontaneous statement].) Deputy Archuletta testified that Latesha was "frustrated with the pain and sobbing" when she answered his question about what happened. (*People v. Merriman* (2014) 60 Cal.4th 1, 66 (*Merriman*) ["a statement uttered while under the stress of excitement interferes with the process of reflection and fabrication, and therefore is considered a true expression of the declarant's observations and impressions"].) Even though she had become calm enough to speak coherently, she remained excited as "she just yelled out, 'My boyfriend, Marcos, shot me.' " (*People v. Poggi* (1988) 45 Cal.3d 306, 319.) If a statement made by a declarant calm enough to speak coherently were therefore deemed not spontaneous, the exception would have little application: only "sounds devoid of meaning" would qualify. (*Ibid.*)

Moreover, that Latesha, in distress and pain, called her friend and roommate to come to her at the apartment complex instead of 911 does not indicate reflection or deliberation as much as lack of it. It is human nature to reach out to a friend for help and

comfort under such circumstances. (*Merriman, supra*, 60 Cal.4th at p. 65 [victim's statement to a friend that the defendant had grabbed her neck and choked her held admissible as a spontaneous statement].)

The trial court did not abuse its discretion in admitting Latesha's statement under Evidence Code section 1240.

Latesha's Out-of-court Identification of Defendant to Keela Cole

Spontaneous Statement

Defendant asserts that the trial court improperly admitted Ms. Cole's testimony that Latesha said that "He" shot her as a spontaneous statement.

The trial court reasoned: "It's within minutes -- about 10 minutes of being shot. She was under the stress of excitement. I'm considering as well the description by the officer of Latesha's condition when he saw her and the fact she was being transported in an ambulance moments after she must have made this statement to Keela."

Defendant incorporates the arguments regarding reflection and deliberation that he offered in support of the contention that Latesha's statement to Deputy Archuletta was improperly admitted under Evidence Code section 1240. If anything, however, Latesha's statement to Ms. Cole qualifies even more as a spontaneous statement than Latesha's answer to Deputy Archuletta's question. The statement to Ms. Cole is closer to the time Latesha was shot. (*Merriman, supra*, 60 Cal.4th at p. 66.) Ms. Cole described Latesha on the telephone asking her to come to the apartment complex as "yelling." Latesha was crying and upset when Ms. Cole arrived. (*Ibid.* [exception applied where victim was "upset and angry" when she described choking incident to friend].) Ms. Cole did not testify that she questioned Latesha but rather that Latesha told her that "she got shot" and "He" shot her. (*Id.* at p. 64 ["whether the declarant blurted out the statement or made it in response to questioning" is a factor in admitting testimony as a spontaneous statement].)

The trial court did not abuse its discretion in admitting Ms. Cole's testimony that Latesha said "He" shot her as a spontaneous statement.

Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct by following up on Ms. Cole's testimony with this question: "From your understanding when she told you that she was shot by her boyfriend you understood her to mean by Mr. Adams?" Ms. Cole responded, "Yeah."

Defendant's claim is that the prosecutor improperly assumed facts not in evidence by referring to the shooter as Latesha's "boyfriend," when Ms. Cole testified that Latesha identified him only as "He" and did not name him.

To be sure, the prosecutor's question did assume facts not in evidence. But any misconduct was de minimis. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 695.) After testifying that Latesha said "He" shot her, Ms. Cole testified that she had seen Latesha and defendant "[a]s a couple," because defendant "was her boyfriend." The jury could draw a reasonable inference that, when Latesha referred to "He," Ms. Cole would know Latesha was referring to defendant as her boyfriend.

Defendant nonetheless argues that the admission of Ms. Cole's apparent confirmation that Latesha was shot by her boyfriend, combined with "Latesha's erroneously admitted statement to Deputy Archuletta," violated due process by convincing the jury that defendant was the shooter. We have concluded that Latesha's statement to Deputy Archuletta was properly admitted. In light of that statement, in which the victim specifically identified defendant by name as the shooter, defendant could not have suffered any significant prejudice from the prosecutor eliciting Ms. Cole's testimony purportedly confirming that Latesha said her "boyfriend" shot her.

Further, defendant concedes that, at trial, his counsel "did not object on the basis of misconduct or request an admonition" regarding the prosecutor's question or Ms.

Cole's answer. Defendant argues that, if defense counsel forfeited the issue in failing to object, "then defense counsel necessarily rendered ineffective assistance of counsel." Defendant is correct that this issue was forfeited on appeal due to counsel's failure to object. (*People v. Fuiava* (2012) 53 Cal.4th 622, 687; *People. v. Collins* (2010) 49 Cal.4th 175, 198.) But he has failed to establish ineffective assistance of counsel.

Under the United States and California Constitutions, a criminal defendant has a right to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 686 [80 L.Ed.2d 674] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) To establish ineffective assistance of counsel, defendant must show both that (1) his trial counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) counsel's performance prejudiced him such that it is reasonably probable defendant would have obtained a better result but for counsel's deficiencies. (*Strickland, supra*, 466 U.S. at pp. 689-694; *Ledesma, supra*, 43 Cal.3d at pp. 216-218.)

Unless defendant establishes to the contrary, we presume trial counsel's performance is within the wide range of professional competence and counsel's action or inaction can be explained as matter of sound strategy. (*People v. Centeno* (2014) 60 Cal.4th 659, 674-675 (*Centeno*).) Where, as here, the record on appeal sheds no light on why trial counsel failed to act in the manner defendant now challenges, defendant must show there was no conceivable tactical purpose for counsel's act or omission. (*Ibid.*; *People v. Cunningham* (2001) 25 Cal.4th at p. 1003 (*Cunningham*).) This is particularly so where the claimed deficiency is failure to object, because the decision to object or not is inherently tactical, and failure to object rarely establishes ineffective assistance of counsel. (*People v. Salcido* (2008) 44 Cal.4th 93, 172.)

Defendant has failed to prove that this is the rare circumstance where defense counsel could have no tactical reason for failing to object. To the contrary, if defense counsel had objected, the prosecutor could have questioned Ms. Cole further about

Latesha's relationship with defendant, which led Ms. Cole to believe that by saying "He" Latesha meant a boyfriend and that boyfriend was defendant. As it stood, Ms. Cole had testified only to her assumption about what Latesha meant. Ms. Cole's testimony was undermined by her concession that she assumed Latesha meant defendant—who Ms. Cole did not recognize at trial—simply because he was sitting in the courtroom. By deciding not to object, defense counsel avoided potentially unfavorable evidence. This tactic paid off when Ms. Cole subsequently testified on cross-examination that Latesha had a number of boyfriends at time of the shooting in August 2015 and that she and defendant appeared to have broken up, testimony that defense counsel highlighted in closing argument.

David Rodriguez's in-court Identification of Defendant

Defendant argues that defense counsel rendered ineffective assistance when counsel failed to object to an unduly suggestive procedure utilized when Mr. Rodriguez identified defendant as the shooter in court. Defendant focuses on counsel's failure to object (1) when the trial court directed Mr. Rodriguez to look at defendant sitting at the counsel table and asked if he was in the photographic lineup where Mr. Rodriguez had previously identified two individuals as resembling the shooter, and (2) when the prosecutor put two fingers over the dreadlocks in defendant's photograph in the lineup and elicited testimony that this photo looked like defendant whose hair was now cut shorter. Defendant contends that this procedure violated his right to due process.

Defendant does not dispute that he waived a challenge on appeal to the identification procedure by failing to make a timely objection to it at trial. (*Cunningham, supra*, 25 Cal.4th at p. 989; *People v. Virgil* (2011) 51 Cal.4th 1210, 1250.) Defendant argues that his counsel was ineffective in failing to object to the procedure.

To begin with, we conclude that Mr. Rodriguez's in-court identification of defendant did not violate due process. In *Cunningham*, the court stated: "In order to determine whether the admission of identification evidence violates a defendant's right to

due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*Cunningham, supra*, 25 Cal.4th at p. 989.)

" 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*Cunningham, supra*, 25 Cal.4th at p. 990; *People v. Carpenter* (1997) 15 Cal.4th 312, 367.) "A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police." (*People v. Slutts* (1968) 259 Cal.App.2d 886, 891 (*Slutts*).)

We do not disagree that an in-court identification of a suspect by his presence at the counsel table is suggestive that the defendant is the individual the prosecution contends is the perpetrator. (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 621; *Garcia v. Superior Court* (1991) 1 Cal.App.4th 979, 984.) On the other hand, the court's request was not significantly different than requiring a defendant to stand for purposes of identification to display physical characteristics, a routine procedure. (*People v. Davis* (2009) 46 Cal.4th 539, 611.) In both cases, the witness is asked to look at the defendant. In *People v. Yonko* (1987) 196 Cal.App.3d 1005, the court held that, where a defendant cannot be found at time of trial, "[s]howing the witnesses a single photo of the defendant is no more *impermissibly* suggestive than an in-court identification with the defendant personally sitting at the defense counsel table in the courtroom." (*Id.* at pp. 1008-1009.) The test is whether an identification procedure is "unduly suggestive." Every in-court identification of the defendant at the counsel table may be said to be suggestive (*Evans*,

supra, 11 Cal.3d at p. 621), but this procedure is not "unduly suggestive." Moreover, the fact that Ms. Lopez—and Mr. Rodriguez initially—could not identify defendant as the shooter in court indicates that this procedure was not unduly suggestive.

As for the prosecutor's alteration of the photographic lineup, in *Slutts, supra*, 259 Cal.App.2d 886, the court faced a similar situation. In that case, the defendant was charged with indecent exposure. The victims were two young sisters. A police officer showed one of the sisters a photographic lineup of five men with similar characteristics. The man who exposed himself had a beard; none of the men in the lineup did. The victim pointed to a photo of the defendant as most closely resembling the man. The officer then drew a beard and mustache on the man and the victim said she thought that was the man. (*Id.* at pp. 889-890.) The court held that this procedure was fair because the victim had first selected that photograph as most closely resembling the man. The court concluded, "[t]o be completely fair [the officer] should have sketched beards on all the photographs; instead she drew a beard only on defendant's picture. While this procedure was unfair to the extent that it tended to confirm the identification already made by [the victim], the unfairness did not produce the identification in the first instance, and so cannot be considered as ground for a claim of denial of due process of law." (*Id.* at pp. 891-892.)

Here, Mr. Rodriguez had tentatively identified two men in the photographic lineup as resembling the defendant. Mr. Rodriguez could not identify defendant in court because he no longer had the dreadlocks he wore at the time of the shooting or as depicted in his photograph in the lineup. Because Mr. Rodriguez had previously selected defendant it was not unfair for the prosecutor to alter the photograph by covering defendant's dreadlocks to approximate defendant's courtroom appearance. To be completely fair, the prosecutor should have followed the same procedure for each photograph in the lineup, or at least for both photographs that Mr. Rodriguez had selected pretrial. Nonetheless, as the court held in *Slutts*, this unfairness did not produce the

initial, tentative identification and therefore did not constitute a denial of due process. (*Slutts, supra*, 259 Cal.App.2d at pp. 891-892; *People v. Hernandez* (1988) 204 Cal.App.3d 639, 653-654; *People v. Perkins* (1986) 184 Cal.App.3d 583, 589.)

Assuming the identification procedure did violate due process, defense counsel's failure to object did not constitute ineffective assistance of counsel. The record is silent on the reason defense counsel did not object to the procedure. Therefore, defendant must show that counsel had no tactical purpose in failing to object. (*Centeno, supra*, 60 Cal.4th at pp. 674-675.) Defendant has not made this showing. It was a reasonable tactical decision not to object because the state of the eyewitness evidence was favorable to a jury determination that the prosecution had misidentified defendant. The lineup identification evidence adduced from Ms. Lopez and Mr. Rodriguez was equivocal. Neither one had been able to positively identify defendant in court. The negative result of the court's request that they focus on defendant at the counsel table supported a conclusion by the jury that the only eyewitnesses who testified at trial could not identify the defendant. Even Mr. Rodriguez's testimony after the prosecutor covered the dreadlocks in defendant's photograph was hardly conclusive. Mr. Rodriguez merely said that defendant at the counsel table "pretty much looked like him without the dreads."

Defense counsel capitalized on Mr. Rodriguez's less-than-positive, in-court identification by highlighting that Mr. Rodriguez saw the shooting in a dark area of the street. The man and woman arguing in the street were facing each other so Mr. Rodriguez observed only the side of their faces. Mr. Rodriguez had testified in response to the prosecutor's questions that the man had tattoos, but on cross-examination he admitted he could not describe the tattoos, whether they were fully colored or what color they were, because "[i]t was dark at the time." Defense counsel confirmed that Mr. Rodriguez could not really describe the woman. And Mr. Rodriguez testified that the entire incident lasted "about a minute." Regarding the photographic lineup, Mr. Rodriguez confirmed on cross-examination that, when he viewed the photographic

lineup, he was not positive either photo he initialed was the shooter. He only looked at the photos for a couple minutes.

Defense counsel emphasized all these weaknesses in closing: the poor lighting; the brevity of the incident; that it was too dark for Mr. Rodriguez to describe the man's tattoos; that both Ms. Lopez and Mr. Rodriguez could not positively identify defendant as the shooter when they viewed the lineup pretrial; and they could not positively identify defendant in court. Under the circumstances, it was not ineffective assistance for defense counsel to view the existing evidence as favorable to defendant and to make the tactical decision that an objection would alert the prosecution to further examine Mr. Rodriguez to bolster his identification of defendant as the shooter. (*Cunningham, supra*, 25 Cal.4th at p. 1005.)

Defendant must also show prejudice to establish ineffective assistance of counsel, i.e., that it is reasonably probable defendant would have obtained a better result but for his counsel's deficiencies. (*Strickland, supra*, 466 U.S. at p 694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.) Defendant has not made this showing. Had defense counsel objected to the procedure utilized for Mr. Rodriguez's in-court identification of defendant, the jury still would have heard Deputy Archuletta's testimony that Latesha identified defendant as the person who shot her, which we hold was properly admitted. Evidence of a positive and specific identification by the victim minutes after the shooting made it very unlikely that an objection to the prosecutor covering defendant's dreadlocks in the lineup would have led to a better result for defendant.

Retroactive Misjoinder

The charges involving Latesha were consolidated with a single misdemeanor count alleging that defendant inflicted physical injury on a person he was dating, Natasha

Doe.[7] Defendant opposed the prosecution's motion to consolidate, which was granted, and before trial filed a motion to sever, which was denied. The charge involving Natasha was dismissed at trial when she could not be located.

On appeal, defendant does not challenge joinder or denial of the motion to sever, but rather contends that (1) subsequent events (i.e., the dismissal of the misdemeanor charge), and/or (2) the information imparted to the jury in voir dire about the dismissed charge, resulted in a grossly unfair trial.

At the commencement of voir dire, the trial court informed potential jurors that "[w]hat I'm about to tell you is not evidence in the case. Your opinions or your discussions about this case must be based on the evidence. Evidence comes in the form of the testimony of witnesses, and any physical exhibits that are submitted into evidence, and anything else I tell you to consider as evidence. [¶] Again, what I say is not evidence. What the lawyers say is not evidence. So do not make up your mind about this case based on what I'm about to tell you. Remember please keep an open mind. I give you this information for two reasons at this point. [¶] First, I want to find out if you know about this case from a source of information outside of this courtroom. I don't believe it received any kind of media attention so I doubt that anybody will know about this case from that kind of exposure. [¶] The other thing is when I give you this information it will tell you what the case is about and I'll be better able to ask questions to find out if you can be a fair juror for this type of case. [¶] So, again, do not form any opinions based on the information I'm about to tell you."

The court then read a neutral statement of the case. (*People v. Sorrels* (2012) 208 Cal.App.4th 1155, 1164-1165 (*Sorrels*) [reading a brief description of the case before conducting voir dire "is commonplace in modern-day trial courts"]; Cal. Stds. Jud.

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[7] As with Latesha, we refer to Natasha Doe by her first name with no disrespect intended.

Admin., § 4.30(b)(8) [in a statement prior to voir dire, the court should "describe the offense" (italics omitted), and inform the jury that defendant has pleaded not guilty to the charge and that the jury will decide whether guilt has been proved beyond a reasonable doubt]; Cal. Rules of Court, rule 4.200(a)(1) [court must conduct pre-voir dire conference with counsel to determine "[a] brief outline of the nature of the case, including a summary of the criminal charges" to be read to the jury].)

The court began: "I've talked to the lawyers and I've seen the documents in this case and I know that the district attorney has charged the defendant, Marcos Manson Adams, with various assault crimes in connection with two incidents. One that occurred on August 30, 2015, the other -- and that one involved a woman named Latesha. And the other occurred on November 28th, 2016, and that involved a woman named Natasha. Natasha also goes by her middle name of Renee."

The trial court read a summary of the events involving Latesha and then turned to those regarding Natasha: "In connection with the November 2016, incident the district attorney['s office] intends to present evidence that the defendant and a woman named Natasha had been on [*sic*] a dating relationship. They were walking on Dry Creek Road near Interstate 80 around 11 p.m. Natasha told the defendant, Mr. Adams, that he needed to stay away from her residence and that caused him to become upset and to punch Natasha and bite her on the neck."

The court concluded: "Mr. Adams has pleaded not guilty to the charges in connection with these incidents and that puts the burden on the district attorney to prove the charges beyond a reasonable doubt."

Defendant agrees that the charge involving Natasha was never mentioned in the parties' opening statements or closing argument and no evidence was presented regarding the allegations that defendant injured Natasha.

Defendant relies on cases where the issue raised was "whether events *after* the court's ruling demonstrate that joinder actually resulted in 'gross unfairness' amounting

to a denial of defendant's constitutional right to fair trial or due process of law." (*Merriman, supra,* 60 Cal.4th at p. 46; *People v. Grant* (2003) 113 Cal.App.4th 579, 587 (*Grant*).) To prevail, defendant must establish a reasonable probability that the joinder affected the jury's verdict. (*Merriman, supra*, 60 Cal.4th at p. 49; *People v. Bean* (1988) 46 Cal.3d 919, 938-940; *Grant, supra,* 113 Cal.App.4th at p. 588.)

In *In re Ponce De Leon* (2004) 117 Cal.App.4th 1116, the court, citing federal cases, described the issue as "[s]pillover prejudice, sometimes referred to as 'retroactive misjoinder,' [which] arises when the 'joinder of multiple counts was proper initially, but later developments . . . render the initial joinder improper.' " (*Id.* at p. 1121; *U.S. v. Katakis* (E.D. Cal. 2017) 252 F.Supp.3d 988, 994 (*Katakis*) ["Prejudicial spillover, or retroactive misjoinder, occurs when joinder of multiple counts or defendants was proper initially, but later developments such as the dismissal of some counts for lack of evidence or reversal of less than all convictions render the initial joinder improper [fn. omitted]"]; *U.S. v. Lazarenko* (9th Cir. 2009) 564 F.3d 1026, 1043 (*Lazarenko*).)

The question on a claim that events subsequent to joinder have resulted in gross unfairness is whether evidence relating to the dismissed count has tended to cause the jury to convict on the remaining counts. (*Lazarenko, supra*, 564 F.3d at pp. 1043-1044; *Katakis, supra*, 252 F.Supp.3d at p. 994.) The issue does not arise where, as in this case, there was no evidence presented to the jury on the dismissed charge. (*U.S. v. Yeung* (9th Cir. 2012) 468 Fed.Appx. 692, 693 [the defendant's reliance on cases "which involved retroactive misjoinder, is misplaced, because the government did not present to the jury any evidence related to any count that was not properly before the court or was subsequently dismissed"].)

Defendant equates the neutral statement read to the jury regarding the charge involving Natasha Doe, as well as comments in voir dire referring in plural to victims and incidents, as the equivalent of evidence presented on a dismissed count. We cannot agree. The trial court prefaced the neutral statement by repeatedly cautioning the jury

that the statement is not evidence, what the court says is not evidence, and the jury's decision must be based on evidence. (*Sorrels, supra*, 208 Cal.App.4th at pp. 1164-1165.) The neutral statement "assists both the court and the parties in their subsequent questioning of jurors to determine if the jurors have some previous knowledge of the facts of the case, live in the area where the crime occurred, know the victims, defendants or gangs involved, or have some affiliation with the responding police, governmental agencies, and businesses." (*Id.* at p. 1164.) "In addition, the statement also serves to introduce or remind jurors of important legal principles underlying a criminal case—that statements by the judge are not evidence, that the prosecution's contentions are not evidence, that the defense does not have to prove anything or produce any evidence, and the all-important burden on the prosecution to prove its case beyond a reasonable doubt." (*Ibid.*; Cal. Stds. Jud. Admin., § 4.30(b)(8).)

As in *Sorrels*, the trial judge here did nothing more than follow the rules. (*Sorrels, supra*, 208 Cal.App.4th at p. 1164.) He repeatedly admonished the jury not to consider the neutral statement—or anything the court said—as evidence, including twice advising the jury not to form an opinion based on the statement. The court emphasized that the jury's decision must be based solely on the evidence and defined evidence as testimony and exhibits, but not what the court or the lawyers may say. The court advised the jury of the "all-important" burden on the prosecution to prove the charges beyond a reasonable doubt.

Defendant argues that, based on Mr. Cropp's testimony that victims of domestic violence do not cooperate with law enforcement, "[o]bviously, the jury 'connected the dots' and considered that Natasha's absence was the result of her refusal to cooperate." This is sheer speculation. There is nothing in the record to indicate that the jury, which heard a neutral statement of the charge involving Natasha, was admonished that the statement was not evidence and the charge must be proved beyond a reasonable doubt, and never heard a word on the subject again, concluded that she had refused to cooperate

against an abuser.

Defendant argues that "prejudice in this matter was compounded" because the court failed to give CALCRIM No. 205 removing the charge against Natasha from jury consideration.[8] Indeed, the trial court's instructions "are a critical factor in assessing whether the jury could compartmentalize the *evidence* against each defendant on each charge . . . ." (*Katakis, supra*, 252 F.Supp.3d at p. 994, italics added; *Grant, supra*, 113 Cal.App.4th at pp. 593.) But where no evidence was presented on a dismissed charge, no instruction is required for the jury to compartmentalize the evidence.

We conclude there was no reasonable probability that the joinder of counts tainted the jury's verdict in this case.

Taking another tack, defendant analogizes the trial court's reading the portion of the neutral statement regarding Natasha to circumstances where the jury considers information mistakenly provided but not admitted as evidence. (*People v. Cooper* (1991) 53 Cal.3d 771, 836.) This situation is treated as "merely 'an error of law . . . such as . . . an incorrect evidentiary ruling.' [Citation.]" (*Ibid.*) "Such error is reversible only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." (*Ibid.*)

The analogy is inapposite. There was no mistake and no information improperly imparted to the jury. Under the applicable rules, a neutral statement of the case must be prepared jointly by counsel for the prosecution and defendant and delivered by the court to acquaint the jury in voir dire with the charges in the case, while at the same time

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[8] CALCRIM No. 205 states: "Count[s] _____ charging the defendant with _____ no longer need[s] to be decided in this case. [¶] Do not speculate about or consider in any way why you no longer need to decide (this/these) count[s]." The accompanying Bench Notes on "Instructional Duty" state: "The court *may* give this instruction if one or more of the original counts has been removed from the case, whether through plea or dismissal." (Italics added.)

expressly admonishing the jury that the statement is not evidence and the charges must be proved beyond a reasonable doubt. (*Sorrels, supra*, 208 Cal.App.4th at pp. 1164-1165; Cal. Stds. Jud. Admin., § 4.30(b)(8); Cal. Rules of Court, rule 4.200(a)(1).) These rules apply regardless of whether a charge is subsequently dismissed. The trial court did not err in following them. (*Sorrels, supra*, 208 Cal.App.4th at pp. 1164-1165.)[9]

CALCRIM No. 332

Although David Cropp testified as an expert on participation by domestic violence victims as witnesses, the trial court did not give CALCRIM No. 332 to inform the jury on how to assess expert testimony. Defendant contends the failure to this instruction was prejudicial error requiring reversal of his conviction. We conclude the error was harmless.

Penal Code section 1127b requires the court to instruct the jury sua sponte on expert testimony whenever an expert testifies in a criminal proceeding. (*People v. Reeder* (1976) 65 Cal.App.3d 235, 241.)

As relevant here, CALCRIM No. 332 provides: "A witness was allowed to testify as an expert and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and

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9 Having determined that the trial court did not commit error in joining the charge involving Natasha or reading the neutral statement of the case describing the charge, we need not reach the Attorney General's contention that defendant forfeited this claim of error by failing to raise these issues when that charge was dismissed. (*People v. Williams* (2010) 49 Cal.4th 405, 468, fn. 9.)

accurate. [¶] You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

Even assuming the trial court erred by not instructing the jury concerning expert testimony, any error was harmless. Although defendant suggests that the "harmless beyond a reasonable doubt" standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705], may apply, California courts employ the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, to error in failing to give a particular instruction sua sponte. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) " ' "[T]he erroneous failure to instruct the jury regarding the weight of expert testimony is not prejudicial unless the reviewing court, upon an examination of the entire cause, determines that the jury might have rendered a different verdict had the omitted instruction been given. [Citations.]" ' [Citations.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1320 (*Williams*), modified on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 560-561.) We apply the *Watson* standard.

In this instance, although the court did not instruct the jury with CALCRIM No. 332, it instructed the jurors on how to evaluate witness testimony in CALCRIM No. 226, which told them to "judge the credibility or believability of the witnesses," applying "the same standards" to "the testimony of each witness," and to "[c]onsider the testimony of each witness and decide how much of it you believe." Regarding how to evaluate believability, the omitted instruction would have specifically referred the jury to CALCRIM No. 226. (CALCRIM No. 332 ["In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally"].) On that point, CALCRIM No. 226 directed the jurors that they could "believe all, part, or none of any witness's testimony" and "may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony," such as the reasonableness of "the testimony when you consider all the other evidence in the case."

Additionally, the trial court instructed the jury with CALCRIM No. 301 that one

witness's testimony alone was sufficient to prove any fact but that, before the jury concluded it did, the jury must "carefully review all the evidence." The court also told the jury how to evaluate conflicting evidence under CALCRIM No. 302.

Finally, the trial court instructed the jury with CALCRIM No. 850 regarding testimony on intimate partner battering and its effects: "You have heard testimony from David Cropp regarding the affect [*sic*] of intimate partner battering. That testimony is not evidence that the defendant committed any of the charged crimes. You may consider this evidence only in deciding whether Latesha's conduct was not inconsistent with the conduct of someone who has been abused."

Together these instructions substantially covered all of the matters required by Penal Code section 1127b and CALCRIM No. 332 and sufficiently informed the jury how to evaluate Mr. Cropp's testimony. We presume the jury followed these instructions absent any contrary indication. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) On this record, any error in failing to give CALCRIM No. 332 was harmless.

Nonetheless, defendant argues that the failure to instruct on expert testimony using CALCRIM No. 332 denied him due process because the jury may have mistakenly believed that an expert's testimony must be true or correct. Defendant does not take into account that CALCRIM No. 226 instructed jurors that they could believe any, some or none of *any* witness's testimony. This instruction did not exclude expert witnesses and CALCRIM No. 332, if given, would have directed the jury to consider CALCRIM No. 226 on the credibility of an expert witness.

Defendant also asserts the omission of CALCRIM No. 332 was not harmless because Mr. Cropp's testimony allowed the jury to speculate that Latesha did not testify, and Natasha did not appear, out of fear or love of defendant. As quoted above, CALCRIM No. 850 only referred to Latesha's testimony and never mentioned Natasha. To the extent CALCRIM No. 850 allowed the jury to consider Mr. Cropp's testimony regarding the reasons for Latesha's reluctance to testify, this is the legitimate—and

limited—purpose of this instruction. (*People v. Housley* (1992) 6 Cal.App.4th 947, 958-959.) But there is no basis to conclude that this instruction, which specifically referred to expert testimony pertaining to Latesha's reluctance to testify, would be extrapolated by the jury to Natasha. Nonetheless, defendant contends he was prejudiced because the jury was never told it could disregard Mr. Cropp's opinions as untrue, incorrect or unreasonable. Defendant, however, points to no particular element of Mr. Cropp's testimony that the jury would have reasonably rejected. Under these circumstances, it is not reasonably probable defendant would have obtained a more favorable result if the court had instructed the jury concerning expert testimony with CALCRIM No. 332. (*Williams, supra,* 45 Cal.3d at p. 1320.)

Cumulative Error

Defendant contends that his conviction should be reversed because cumulative error denied his right to due process. Since we have " 'either rejected on the merits defendant's claims of error or have found assumed errors to be nonprejudicial[,] [w]e reach the same conclusion with respect to the cumulative effect of any [purported] errors.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

KRAUSE, J.